

**A** **Abdol Mulok bin Awang Damit v  
Perdana Industri Holdings Bhd**

COURT OF APPEAL (KUALA LUMPUR) — APPEAL NO W-02-376 OF 1999  
DENIS ONG, MOHD SAARI AND RICHARD MALANJUM JJCA  
31 MAY 2003

**B** *Civil Procedure* — *Summary judgment* — *Appeal* — *Triable issues* — *Whether bare assertions sufficient to necessitate full trial*

**C** This was an appeal from the decision of the judge in chambers upholding the decision of the senior assistant registrar in allowing the plaintiff to enter final judgement against the defendant. The issues for determination was whether the advance made in the transaction was in breach of the Moneylenders Act 1951 and hence illegal; and also whether the judge in the court below had erred in insisting that the bare assertion of the appellant was not sufficient to be tried.

**D** **Held**, dismissing the appeal and affirming the decision of the judge in the court below:

**E** The issue of illegality of the transaction was not put before the learned judge in the court below. Neither was the same alluded to in the statement of defence nor in the affidavit in opposition. It was not shown in any fashion that the transaction in question was ex facie illegal as to warrant the court not to enforce it. In this case, there was nothing at all except for the bare assertion by the appellant. The High Court agreed with the learned judge in the court below that the letter of undertaking to repay the advance was crucial in that it indicated the clear intention of the appellant at that point in time. Bare assertion does not necessarily amount to a triable issue thereby compelling a case to go for a full trial. It may still be subject to curial scrutiny for its value (see pp 444E–G, 445G–I); *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 followed.

**[Bahasa Malaysia summary]**

**G** Ini adalah satu rayuan daripada keputusan hakim dalam kamar mengesahkan keputusan penolong kanan pendaftar yang membenarkan plaintif memasuki penghakiman muktamad terhadap defendan. Persoalan-persoalan untuk ditentukan adalah sama ada pendahuluan yang dibuat dalam transaksi tersebut melanggar Akta Pemberipinjam 1951 dan oleh itu menyalahi undang-undang; dan juga sama ada hakim di mahkamah bawahan telah terkhalaf apabila menegaskan bahawa kenyataan asas perayu tidak mencukupi untuk dibicarakan.

**H** **Diputuskan**, menolak rayuan tersebut dan mengesahkan keputusan hakim di mahkamah bawahan:

**I** Persoalan kepenyalahan undang-undang transaksi tersebut tidak dikemukakan di hadapan hakim yang bijaksana di mahkamah bawahan. Begitu juga dalam pernyataan pembelaan maupun dalam

afidavit pembangkang. Ia tidak ditunjukkan dalam apa-apa cara bahawa transaksi yang dipersoalkan adalah menyalahi undang-undang *ex facie* bagi mewarankan mahkamah untuk tidak menguatkuasakannya. Dalam kes ini, tiada apa-apa selain kenyataan asas oleh perayu. Mahkamah Tinggi bersetuju dengan hakim yang bijaksana di mahkamah bawahan bahawa surat akujanji untuk membayar balik pendahuluan tersebut adalah penting kerana ia akan menunjukkan niat nyata perayu pada masa tersebut. Kenyataan asas tidak semestinya merupakan satu persoalan yang boleh dibicarakan yang memerlukan suatu kes itu menjalani perbicaraan penuh. Ia masih boleh tertakluk kepada penelitian terperinci terhadap nilainya (lihat ms 444E–G, 445G–I); *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 diikuti.

### Notes

For cases on appeal against summary judgment, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 5726–5775.

### Cases referred to

*Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 (folld)  
*Lim Kar Bee v Duofortis Properties (M) Sdn Bhd* [1992] 2 MLJ 281 (refd)

*Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 (refd)  
*Overseas Investment Pte Ltd v Anthony William O'Brien & Anor* [1988] 3 MLJ 332 (refd)

*Seven Seas Supply Co v Rajoo* [1966] 1 MLJ 71 (refd)  
*Tan Cheng Hock v Chan Thean Soo & Anor* [1987] 2 MLJ 479 (refd)  
*Teh Eok Kee & Anor v Tan Chiah Hock & Anor* [1995] 3 MLJ 613 (refd)

*Thangaulu v Saudagar Singh* [1965] 1 MLJ 38 (refd)  
*Wong Hon Leong David v Noorazman bin Adnan* [1995] 3 MLJ 283 (refd)

### Legislation referred to

Moneylenders Act 1951

Rules of the High Court 1980 O 14, O 18 r 8(1)

**Appeal from:** Civil Suit No D3–22–1046 of 1997 (High Court, Kuala Lumpur)

*Rakhbir Singh (Jagdish Kaur with him) (Rakhbir Singh & Co)* for the appellant.

*Joseph Yeo (Joseph Yeo)* for the respondent.

**Richard Malanjum JCA** (delivering judgment of the court):. On 10 February 2003, we dismissed the appeal of the appellant/defendant ('appellant') against the decision of the High Court allowing the application of the respondent/plaintiff ('respondent') to enter final judgment pursuant to O 14 of the Rules of the High Court 1980 ('the RHC').

**A** In coming to our decision, we indicated that we would give our reasons later. We do so now.

In its statement of claim, the respondent prayed for the following:

- (i) the sum of RM2,929,452.05;
- (ii) interest at the rate of 15%pa on the sum of RM2,500,000 from 17 September 1997 to date of full payment;
- B** (iii) costs;
- (iv) such other order or relief as deemed fit.

**C** The appellant filed his defence on 20 February 1998 denying any liability and asserted that the purported agreement was a sham and thus the respondent should be estopped from relying on it. And the appellant averred, inter alia, that he did not obtain the advance for himself but only respondent in its quest to ensure the increase in the cash flow of a company called the Labuan Securities Sdn Bhd ('the company') in which the respondent had 28.7% equity interest. It was further asserted by the appellant that the respondent went through him because he was a director of the company and that in turn the said sum given by the respondent became part of the RM5,000,000 he lent to the said company.

**D** By way of summons in chambers dated 12 February 1998 supported by an affidavit of Koay Seng Lee affirmed on 9 February 1998 ('Koay's first affidavit'), the respondent applied for summary judgment.

**E** The appellant opposed the application and filed his affidavit in opposition affirmed on 26 February 1998 ('appellant's first affidavit').

The appellant's first affidavit was replied to by an affidavit of Koay Seng Lee affirmed on 28 March 1998 ('Koay's second affidavit').

**F** Briefly, it was the assertion of the respondent that at the request of the appellant it advanced the sum of RM2,500,000 to him. Such transaction was reduced in writing vide an agreement dated 25 July 1996 ('the agreement') containing the terms of the advance.

**G** In opposing the application, the appellant referred to his defence filed and relied on the defences pleaded thereto. He elaborated that the request for assistance was made by the then chief executive officer of the respondent, Mr Yip Yee Foo ('Yip'). According to the appellant, it was Yip who came up with the idea of a loan agreement for the appellant to sign being part of the scheme to increase the cash flow of the company.

The appellant also referred to a document, unsecured subordinated term loan agreement, which he claimed to have entered into with the company in respect of a loan of RM5,000,000 to the latter and in which the RM2,500,000 purported advance from the respondent became part of it.

**H** As regards a letter which he signed pertaining to the alleged advance, the appellant explained that it was at the behest of Yip and was made in order to help the respondent to explain to the Securities Commission concerning the said advance.

**I** In reply to the assertions of the appellant, the respondent through Kaoy's second affidavit stated that it had no knowledge of them and that Yip no longer worked for the respondent.

Hearing of the summons in chambers came before the senior assistant registrar who gave judgment for the respondent on 27 May 1998.

Subsequently, the appellant appealed to the judge in chambers who heard the appeal and affirmed the decision of the senior assistant registrar.

A

In his grounds of judgment, the learned judge in the court below dealt with the three issues which he said were raised by the appellant, namely:

- (a) that there were representations made by Yip;
- (b) that those representations were binding on the respondent; and
- (c) that the respondent is estopped from enforcing the agreement for the repayment of the sum advanced.

B

In dismissing the appeal, the learned judge found that there were no representations made since the appellant failed to produce any evidence of such assertions and hence there was no question of binding collateral agreement. The learned judge also found that the agreement was binding and enforceable since the appellant even admitted liability vide a letter dated 16 October 1996.

C

Before us, learned counsel for the appellant at the outset submitted that the transaction was caught by the Moneylenders Act 1951 ('the Act') in view of the element of interest imposed under the agreement. And according to learned counsel, the respondent was not a licensed money lender at all material times. In short, the advance made to the appellant was in breach of the Act and hence illegal. The other points raised were on those that were put before the judge in the court below and submitted that they were triable issues. Learned counsel for the appellant also submitted that the judge in the court below erred in insisting that the bare assertion of the appellant was not sufficient.

D

E

We deal first on the initial point raised. We declined to allow learned counsel for the appellant to dwell on the point bearing in mind, O 18 r 8(1) of the RHC. We also noted that the issue of illegality of the transaction was not put before the learned judge in the court below. And neither was the same alluded to in the statement of defence nor in the affidavit in opposition filed by the appellant. We were well aware of the settled principle that a party may raise a point on illegality even at an appeal stage (see *Thangaulu v Saudagar Singh* [1965] 1 MLJ 38). However, in the instant case, it was not shown in any fashion that the transaction in question was ex facie illegal as to warrant the court not to enforce it. There was nothing in the agreement stipulating interest chargeable. Only funding costs (see *Seven Seas Supply Co v Rajoo* [1966] 1 MLJ 71; *Lim Kar Bee v Duofortis Properties (M) Sdn Bhd* [1992] 2 MLJ 281).

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In respect of the assertion by the appellant that there were representations made by Yip, we were inclined to agree with the learned judge in the court below that it was only a bare assertion. Indeed, the appellant did not explain for his failure to respond to the demand letter dated 16 September 1997 (exh P 5 of Koay's first affidavit) at the first opportunity available (see *Wong Hon Leong David v Noorazman bin Adnan* [1995] 3 MLJ 283 at p 288; *Tan Cheng Hock v Chan Thean Soo & Anor* [1987] 2 MLJ 479 at p 487). Such failure seems to reconcile with the fact that by a letter dated 16 October 1996 (exh P 3 of Koay's first affidavit) the appellant gave his undertaking to repay the advance taken. No doubt the appellant gave his explanation in his affidavit for giving the said undertaking. But surely, he could have come up with that much earlier or

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I

A at least a follow up to that undertaking when the demand came up. None of these took place. There was no assertion that the appellant was then a mere country yokel. On the contrary, he was the executive chairman of the company with shares valued in millions of ringgit (see *Teh Eok Kee & Anor v Tan Chiah Hock & Anor* [1995] 3 MLJ 613).

B Learned counsel for the appellant relied on the fact that the respondent failed to deny or dispute the assertion by the appellant of an existence of representations by the said Yip and thus should be deemed to have admitted it as true. That of course is in accordance with the settled principle of law (see *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281; *Overseas Investment Pte Ltd v Anthony William O'Brien & Anor* [1988] 3 MLJ 332).

C However, in the instant case, it was not that the respondent did not dispute the assertion. What the respondent did was to say that it had no knowledge of such assertion since Yip was no longer in its employment. In our view, such a stand should be sufficient to answer the assertion given the fact that Yip had left the employment with no trace of documentary evidence left for such representations having been made. It might have been a different situation if Yip had deposed to such a fact for the appellant.

D Thus, given the facts and circumstances of this instant case and based on the documentary evidence available and the subsequent conduct of the appellant, we do think that the conclusion of the learned judge in the court below, namely, that there was no representations as alleged, could be considered as unreasonable. With such conclusion, the argument that a binding collateral agreement existed should equally fail.

E The next contention of learned counsel for the appellant was that the respondent should be estopped from enforcing the agreement. This of course was made on the basis that the earlier contentions were true. However, in affirming the conclusions of the learned judge in the court below, this issue would also fail.

F It was the gist of the contention of learned counsel for the appellant that the agreement was a sham in view of the arrangement made with the respondent through Yip. With respect, we were not impressed with the argument in view of the fact that we were not convinced that there existed representations made by the respondent through Yip. We would repeat our reasons as given for the earlier contentions to conclude that the agreement could not have been a sham. If it was, then surely there should have been G contemporaneous document or documents to reflect such an arrangement. In this case, there was nothing at all except for the bare assertion by the appellant. We agree with the learned judge in the court below that the letter of undertaking to repay the advance was crucial in that it indicated the clear intention of the appellant at that point in time.

H It was the contention of learned counsel for the appellant that since it was only an O 14 application, all that was required of the appellant was to raise triable issues and that he should not be expected to come up with proofs as ruled by the learned judge in the court below. With respect, such a submission is not entirely consistent with our current judicial trend. Bare assertion does not necessarily amount to a triable issue thereby compelling a case to go for a full trial. It may still be subject to curial scrutiny for its I value. Indeed in *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400, his Lordship Mohd Azmi FCJ gave a clear guide on the approach to be adopted when he said this at p 408:

In our view, basic to the application of all those legal propositions, is the requirement under O 14 for the court to be satisfied on affidavit evidence that the defence has not only raised an issue but also that the said issue is triable. The determination of whether an issue is or is not triable must necessarily depend on the facts or the law arising from each case as disclosed in the affidavit evidence before the court. On the treatment of conflict of evidence on affidavits, Lord Diplock speaking in the Privy Council on *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212 had this to say at p 217:

Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be.'

Although Lord Diplock was dealing with an application for removal of caveat in that particular case, we are of the view that the above principle of law is relevant and applicable in all cases where a judge has to decide a case or matter on affidavit evidence.

Under an O 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O 14 application. Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.

Where the issue raised is solely a question of law without reference to any facts or where the facts are clear and undisputed, the court should exercise its duty under O 14. If the legal point is understood and the court is satisfied that it is unarguable, the court is not prevented from granting a summary judgment merely because 'the question of law is at first blush of some complexity and therefore takes a little longer to understand' (see *Cow v Casey* [1949] 1 All ER 197 and *European Asian Bank AG v Punjab & Sind Bank* [1983] 2 All ER 508 at p 516.).

Accordingly, none of the alleged issues raised above as well as the other issues which may not have been specifically dealt with in this judgment can be considered as amounting to triable issues.

We therefore affirmed the decision of the judge in the court below and dismiss this appeal of the appellant with costs to be taxed. Deposit to be paid to the respondent towards the account of taxed costs.

*Decision of judge in court below affirmed and appeal dismissed.*